UNITED STATES COURT OF APPEALS
For the Second Circuit
United States Court House
40 Foley Square
New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of July one thousand nine hundred and ninety-five.

Itoba Limited

Plaintiff-Appellant,

v. Dkt No: 94-7562

LEP Group PLC

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellees, LEP GROUP PLC, WILLIAM R. BERKLEY, PETER R. GRANT and JOHN R. EAST.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, CLERK
By: /s/

Beth J. Meador Date
Administrative Attorney

[Order entered on July 14, 1995.]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May, one thousand nine hundred and ninety-five.

PRESENT: HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. ROGER J. MINER,
Circuit Judges.

Docket # 94-7562

ITOBA LIMITED,

Plaintiff-Appellant,

- v -

LEP GROUP PLC., WILLIAM R. BERKLEY, JOHN L. READ, PETER J. GRANT & JOHN R. EAST,

Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is reversed and the matter

remanded to the said district court for further proceedings consistent with the opinion of this Court.

GEORGE LANGE III, Clerk

By: /s/
Arthur M. Heller
Administrative Attorney

[Judgment entered on May 15, 1995]

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 582 - August Term 1994

(Argued December 1, 1994 Decided May 15, 1995)

Docket No. 94-7562

ITOBA LIMITED,

Plaintiff-Appellant,

v.

LEP GROUP PLC, WILLIAM R. BERKLEY, JOHN L. READ, PETER J. GRANT, JOHN R. EAST,

Defendants-Appellees.

Before: FEINBERG, VAN GRAAFEILAND and MINER, Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut (Eginton, J.) dismissing appellant's securities fraud action for lack of subject matter jurisdiction.

Reversed and remanded.

MARK C. ZAUDERER, New York, NY (James Robert Pigott, Jr., Stein, Zauderer, Ellenhorn, Frischer & Sharp, New York, NY, Richard F. Lawler, James C. Riley, Whitman Breed Abbott & Morgan,

Greenwich, CT, of counsel), for Plaintiff-Appellant.

JEFFREY E. GLEN, New York, NY (Berwin Leighton, New York, NY, Mark B. Seiger, Halloran & Sage, Hartford, CT, of counsel), for Defendant-Appellee LEP Group Plc.

WILLIAM MCGUINNESS, New York, NY (Fried, Frank, Harris, Shriver & Jacobson, New York, NY, of counsel), for Defendants-Appellees William R. Berkley and Peter J. Grant.

Alan H. McLean, Stamford, CT (Neville, Shaver, Kelly & McLean, Stamford, CT, of counsel), for Defendant-Appellee John R. East.

John L. Read, pro se.

VAN GRAAFEILAND, Circuit Judge:

Itoba Limited appeals from a judgment of the United States District Court for the District of Connecticut (Eginton, J.) dismissing its securities fraud action against Lep Group PLC, William Berkley, John Read, Peter Grant and John East for lack of subject matter jurisdiction. For the reasons stated below, we reverse and remand for further proceedings.

The corporate defendant in this case, Lep Group PLC, is a London-based holding company with some fifty subsidiaries operating in thirty countries. It is a true conglomerate, owning businesses in freight forwarding, home

security systems, biotechnology, travel services, and real estate speculation. Lep's "ordinary shares", the British equivalent of common stock, are registered in the United Kingdom, obligating the company to comply with United Kingdom securities laws. The primary trading market for Lep's ordinary shares is the International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd. (the "London Exchange").

To create a United States market for its ordinary shares, Lep deposited 12,842,850 of its approximately 136 million shares in an American depository in 1988. The depository in turn issued an American Depository Receipt (ADR) for each five ordinary shares of Lep on deposit. Because these ADRs trade in the form of American Depository Shares (ADSs) on the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), Lep is subject to the reporting and disclosure requirements of United States securities law.

A.D.T. Limited ("ADT") is a transnational holding company based in Bermuda. Its shares are listed on the New York Stock Exchange and approximately fifty percent of its shareholders of record reside in the United States. Itoba, a Channel Islands company, is a wholly-owned subsidiary of ADT. ADT also is the corporate parent of A.D.T. Securities Systems, Inc., a Delaware based firm and one of America's largest suppliers of security and protection services.

In mulling over expansion plans for A.D.T. Securities Systems, ADT considered the possible acquisition of one of A.D.T. Securities Systems' largest competitors in the American security market, National Guardian. ADT already owned a small interest in that corporation through shares it held of Lep, the parent company of National Guardian. Because ownership of Lep would lead to control of National Guardian, ADT considered increasing its Lep holdings.

At the same time, Canadian Pacific was interested in expanding into the freight forwarding business and also was pondering a sizable investment in Lep. Learning of their mutual interest, the companies agreed to explore a joint purchase of Lep. Canadian Pacific hired S.G. Warburg, a London investment bank, to evaluate Lep's business operations. Nicholas Wells, ADT's in-house financial analyst, was directed by Michael Ashcroft, ADT's chairman, to perform a valuation of Lep.

In December 1989, S.G. Warburg issued an extensive report assessing Lep's prospects. The analysis in this report was based on Lep's U.K. annual reports, the Form 20-F that Lep filed with the United States Securities and Exchange Commission for the year ended December 31, 1988, Lep's shareholder register, and broker reports. Shortly after the Warburg report was issued, Canadian Pacific abandoned the proposed joint venture.

ADT's interest, on the other hand, did not diminish. Wells continued his examination of Lep, relying heavily on the Warburg report. To supplement his research, he obtained from Canadian Pacific a copy of Lep's Form 20-F for 1988. Wells frequently discussed his analyses of these documents with David Hammond, ADT's vice chairman and the person in charge of acquisitions.

Based on Wells' analyses and their own review of the Warburg report, Hammond and Ashcroft decided to acquire Lep. Soon thereafter, Hammond formulated a plan to increase ADT's Lep holdings by making anonymous purchases on the market through one of ADT's off-shore companies, in this case Itoba. Hammond contacted the board members of Itoba and recommended that they approve his purchase plan.

As expected, Itoba's board approved the plan. Itoba's board then requested one of ADT's employees to commence share purchases in Itoba's name; these purchases were made according to Hammond's plan and paid for by ADT. During

the second half of 1990, Itoba executed a number of significant purchases on the London Exchange pursuant to the plan. By November 1990, Itoba had acquired over 37 million Lep ordinary shares for approximately $114 million.

Before ADT could complete its planned acquisition, however, Lep disclosed a series of business reversals that decimated its share value; Lep's stock price plummeted 97% and the value of Itoba's Lep holdings declined by nearly $111 million. Lep wrote off approximately $522 million from its books for the fiscal year ended December 31, 1991.

Itoba sued Lep and its officers in the District of Connecticut, asserting violations of sections 10(b) and 20 of the Securities Exchange Act of 1934 (the "Act") and of Rule 10b-5. According to Itoba, the defendants were subject to liability because they failed to disclose material matters in statements filed with the SEC. Specifically, Itoba alleged that Lep made high risk investments and engaged in speculative business ventures without informing the investing public. Itoba claimed that had these matters been properly disclosed, it would not have purchased Lep's stock at artificially inflated prices.

Itoba also asserted claims against Lep director William Berkley for alleged violations of sections 10(b) and 12(2) of the Act and of Rule 10b-5. Berkley, a United States citizen and a resident of Connecticut, had sold a large block of Lep ordinary shares in the United States on the same day that Itoba purchased a large block of shares in London. Itoba alleged that had Berkley properly complied with his duty to disclose material, nonpublic information before trading, it would not have made that purchase.

Defendants moved to dismiss Itoba's claims for lack of subject matter jurisdiction, and Magistrate Judge Jean Margolis, to whom the matter was referred for recommendation and report, issued a report that recommended dismissing Itoba's action on jurisdictional grounds. The district court adopted the magistrate judge's recommendations in toto.

It dismissed Itoba's action on Fed. R. Civ. P. 12(b)(1) grounds in a short-form order. This, we conclude, was error.

It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application. See, e.g., Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir.) (citing 15 U.S.C. § 78aa), cert. denied, 501 U.S. 1005 (1991). However, in determining whether Congress intended that the "precious resources of United States courts" be devoted to a specific transnational securities fraud claim, we are not without guidance. Two jurisdictional tests have emerged under this Court's decisions: the "conduct test", as announced in Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972), and the "effects test", as announced in Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09 (2d Cir.), rev'd with respect to holding on merits, 405 F.2d 215 (2d Cir. 1968) (in banc), cert. denied sub nom. Manley v. Schoenbaum, 395 U.S. 906 (1969). There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court. It is in this manner that we address the issue of jurisdiction in the instant case. Because we believe that the allegations are sufficient to support jurisdiction, we reverse.

Under the conduct test, a federal court has subject matter jurisdiction if (1) the defendant's activities in the United States were more than "merely preparatory" to a securities fraud conducted elsewhere, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir.), cert. denied, 423 U.S. 1018 (1975), and (2) these activities or culpable failures to act within the United States "directly caused" the claimed losses, Alfadda, supra, 935 F.2d at 478. Inherent in the conduct test is the principle that Congress does not want "'the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."' Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir.

1983) (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975)).

The magistrate judge correctly stated the conduct test when she said that Itoba must prove that Lep's United States-based activities directly caused Itoba's financial losses. However, whether she correctly applied the test is an entirely different matter. The magistrate judge based her recommendation to deny jurisdiction on the following findings:

> First, Itoba and ADT did not read the SEC filing and rely on them; it was an investment bank hired by ADT which had reviewed the documents. And second, the SEC filings were filed in connection with LEP's ADS's and ADR's, not the ordinary shares purchased by Itoba, for which annual reports and press releases were generated from England.

The magistrate judge's first finding -- that ADT and Itoba did not read and rely on the SEC filing in making their purchase decision -- must be rejected in view of the clearly-established fact that the executives of Itoba and ADT based their investment decision on the Warburg report. The analyses and conclusions in this report were predicated on information found in the Form 20-F that Lep filed with the SEC. Nicholas Wells, the ADT executive responsible for assessing investment prospects, made the Warburg report the centerpiece of his Lep valuation. Moreover, he not only relied on the discussion of the SEC filing as contained in the Warburg report, he also used his own copy of the 1988 Form 20-F to formulate his purchase recommendations. According to the affidavit of ADT's vice chairman, the decision to acquire Lep was based upon these recommendations.

The fact that Itoba's board members did not read the SEC filing is not of controlling significance. A party need not personally have read a misleading financial report to establish reliance; derivative reliance is a well-established basis for

liability in a Rule 10b-5 action. See, e.g., Austin v. Loftsgaarden, 675 F.2d 168, 177-78 & n.19 (8th Cir. 1982), appeal after remand, 768 F.2d 949 (8th Cir. 1985), rev'd on other grounds sub nom. Randall v. Loftsgaarden, 478 U.S. 647 (1986); Garfinkel v. Memory Metals, Inc., 695 F. Supp. 1397, 1404 (D. Conn. 1988); Kronfeld v. Trans World Airlines, Inc., 104 F.R.D. 50, 53-54 (S.D.N.Y. 1984); Walsh v. Butcher & Sherrerd, 452 F. Supp. 80, 84 (E.D. Pa. 1978); In re Ramada Inns Sec. Litig., 550 F. Supp. 1127, 1131 (D. Del. 1982). The acquisition plan that Itoba's directors approved was formulated and funded by ADT, which in turn relied on its financial officer's analysis of the Warburg report and Lep's SEC filing. The contents of Lep's 1988 Form 20-F were thus a "substantial" and "significant contributing cause" to Itoba's purchase decision. There is no requirement, as suggested by the magistrate judge's decision, that Itoba read Lep's filing before it could rely on it.

The magistrate judge's second reason for denying the jurisdiction, i.e., that the SEC filings were made in connection with Lep's ADSs and ADRs, not its ordinary shares, is only fifty percent correct and therefore is one hundred percent wrong. The ADRs were simply a grouping into one security of five ordinary shares. Inevitably, there was a direct linkage between the prices of the ADRs representing five ordinary shares and the prices of the single ordinary shares themselves. If the ordinary share price fell on the London Exchange, the market price of an ADR would decrease in similar manner, and visa versa.

Finally, a Rule 10b-5 action is not barred because a false and misleading statement in an SEC filing pertains to a security that is not the security purchased. See In re Ames Dep't Stores Inc. Stock Litig., 991 F.2d 953, 961-62 (2d Cir. 1993). So long as the fraudulent device employed is of the type that would cause reasonable investors to rely thereon and, so relying, cause them to purchase or sell the corporation's securities, a Rule 10b-5 action may lie. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968) (in banc), cert.

denied, 394 U.S. 976 (1969). SEC filings generally are the type of "devices" that a reasonable investor would rely on in purchasing securities of the filing corporation. When these United States filings include substantial misrepresentations, they may be a predicate for subject matter jurisdiction. See Psimenos, supra, 722 F.2d at 1045 (citing Leasco, supra, 468 F.2d at 1337).

The fact that the Lep ordinary shares were issued and purchased in England does not change our conclusion. "The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out the alleged fraudulent scheme. . . ." Psimenos, supra, 722 F.2d at 1045; see Leasco, supra, 468 F.2d at 1337.

Moreover, the making of the allegedly false and misleading filings with the SEC was not "merely preparatory to the fraud." Although the magistrate judge refrained from forthrightly stating as much, she tiptoed around that statement as follows:

> It is beyond dispute that SEC filings and press releases are the type of information on which an investor relies in making his or her investment decisions. Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968), cert. denied sub nom. Coates v. Securities & Exchange Comm'n, 394 U.S. 976 (1969). Even beyond the issue of whether the SEC filings were "merely preparatory to the fraud," plaintiff cannot demonstrate that the alleged acts within the United States "directly caused [its] losses" for two reasons.

She then propounded the two reasons we have rejected in the preceding paragraphs and cited two cases whose application here is questionable at best, Koal Industries Corp. v. Asland,

S.A., 808 F. Supp. 1143, 1153-55 (S.D.N.Y. 1992) and Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 107-08 (S.D.N.Y. 1993). In Koal Industries, a Panamanian corporation acquired two Netherlands Antilles corporations which owned interests in an Arkansas mining company. The entire transaction took place in Switzerland and the financing was obtained from outside the United States. The only contact with the United States other than the location of the mine was a telephone call seeking additional funds for the acquisition. Northgate involved a motion for class certification. The defendant was a Canadian corporation which owned an interest in a gold mine located in northern Canada, concerning which the defendant filed allegedly false SEC statements. The proposed class was to consist of all persons who purchased Northgate stock on the Toronto, Montreal, London and New York Exchanges. The defendant requested that the class be limited to those who purchased on the New York Exchange, and the district court granted its request. In contrast to the discretionary nature of the district court's class certification ruling and the "fraud on the market" class issues of Northgate, the instant case involves a single plaintiff asserting direct individual fraud.

Appellees address the issue of "preparatory conduct" more directly. They assert that the mere filing of a document with the SEC should not trigger jurisdiction in United States courts. In support of this contention, they point out that Lep's financial statements were prepared in England and contend that the act of filing alone should not confer subject matter jurisdiction in the United States. They say further that the filing was "incidental or preparatory conduct" in whatever wrongdoing may have occurred. With respect to the first contention, we hold that the situs of preparations for SEC filings should not be determinative of jurisdictional questions. Otherwise, the protection afforded by the Securities Exchange Act could be circumvented simply by preparing SEC filings outside the United States. We find no support in the Act for such a result.

The second half of appellant's argument overlooks a basic purpose of the securities law, which is fair disclosure of material facts. A material fact that is undisclosed in an SEC filing remains undisclosed absent public enlightenment. This may bring into play a concomitant duty, i.e., the duty to correct. See 2 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 6.11, at 138.401-.509 (2d ed. 1994). Lep's uncorrected nondisclosure played as much a role in Itoba's purchases as the price listings on the London Exchange and NASDAQ. In view of the deleterious effect this continued nondisclosure had on the thousands of ADT shareholders in the United States, it cannot be described correctly as incidental or preparatory.

This argument, of course, combines pertinent principles of both the conduct and effects tests, the latter one being based on fraud which takes place abroad which impacts on "stock registered and listed on [an American] national securities exchange and [is] detrimental to the interests of American investors." Schoenbaum, supra, 405 F.2d at 208. Here, we have fraud occurring on an American exchange and persisting abroad that has impacted detrimentally upon thousands of United States shareholders in the defrauded company, i.e., over $100 million lost in the shareholders' corporate equity.

The magistrate judge held that "if ADT were the plaintiff, the 'effects test' would be met, in that ADT's stock is traded on the New York Stock Exchange and approximately fifty percent (50%) of its shares are held in this country." See generally Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir.), amended on other grounds, 890 F.2d 569 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989); Matter of Marc Rich & Co. A.G., 707 F.2d 663, 666-67 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); Restatement (Second) of Law of Foreign Relations § 18(b), cmt. d. We believe this reasoning applies with equal effect where, although Itoba, ADT's wholly-owned subsidiary, was the nominal purchaser and owner of the Lep stock, it was ADT

which financed the deal and which, with its shareholders, ultimately must bear the loss. This is not a case in which Lep's acts "simply [had] an adverse affect [sic] on the American economy or American investors generally." See Bersch, supra, 519 F.2d at 989. In short, we hold that a sufficient combination of ingredients of the conduct and effects tests is present in the instant case to justify the exercise of jurisdiction by the district court. See generally Leasco, supra, 468 F.2d at 1338.

For some reason that is not clear to us, the magistrate judge did not consider it necessary to address specifically Itoba's causes of action against any of the individual defendants. She simply recommended a blanket dismissal of the complaint as to all defendants, which recommendation was adopted without discussion by the district court. We find this particularly troublesome with respect to the defendant Berkley.

On October 8, 1990, Berkley, a United States resident and a Lep director, sold 7,300,000 ordinary shares of Lep to his United States-based broker, New York & Foreign Securities Corporation, which in turn sold these shares for its own account on the London Exchange. Berkley received almost $24 million for his shares. That same day, Itoba purchased 7,500,000 shares on the London Exchange through its London-based broker. Whether the close temporal relationship of these two transactions is or is not coincidental presents an interesting question. After executing this purchase, Itoba and ADT executives learned that the shares they had acquired were owned previously by Berkley. When Itoba brought the instant action, it asserted a separate claim against Berkley based on this Court's "disclose or abstain" rule, which imposes on insiders a duty to disclose material information before trading in their company's securities. See SEC v. Texas Gulf Sulphur Co., supra, 401 F.2d at 848. In Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 237 (2d Cir. 1974), we held that an insider who fails to comply with his duty to disclose or abstain can be held liable "not only to the purchasers of the actual shares sold by [the insider,] but to all

persons who during the same period purchased [the corporation's] stock in the open market without knowledge of the material inside information which was in the possession of [the insider]."

Although we do not presently rule on the issue, it would seem that Berkley's failure to disclose material, nonpublic information prior to selling his Lep shares is the type of behavior that falls under this Rule 10b-5 rubric. Because antifraud provisions are designed to prevent corporate insiders from taking unfair advantage of uninformed outsiders, Shapiro v. Merrill Lynch, supra, 495 F.2d at 235 (citing Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 890 (2d Cir. 1972)), Berkley's alleged nondisclosure during a sales transaction executed by two parties within the United States -- Berkley and his broker -- is the type of conduct that should trigger jurisdiction. See Roth v. Fund of Funds, Ltd., 279 F. Supp. 935, 936-37 (S.D.N.Y.), aff'd, 405 F.2d 421 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969).

Moreover, it is not clear that Itoba is disabled from asserting its claim because it purchased its shares on a foreign market -- the London Exchange. In Shapiro v. Merrill Lynch, supra, we held that an inside trader is subject to liability to all purchasers of his corporation's stock on the "open market." 495 F.2d at 237. Whether the "open market" encompasses foreign exchanges is an issue we leave for remand.

We conclude that Itoba's claim against Berkley should not have been incorporated without discussion into Itoba's claim against the non-resident defendants and just as silently dismissed.

CONCLUSION

Unlike some securities actions brought to recover questionable damages on behalf of optimistically described classes, we are met here with a single plaintiff which suffered direct substantial losses. A plaintiff such as this should not be

deprived of its day in an American court by a Rule 12(b)(1) order based on erroneous facts and questionable law. We conclude that the issues now before us best can be resolved by a trial on the merits in which the facts relevant to jurisdiction may be more fully developed. See Bersch, supra, 519 F.2d 992-93 (quoting Leasco, supra, 468 F.2d at 1330). We reverse the judgment below and remand for such a trial.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ITOBA LIMITED

v.

LEP GROUP plc, et al

CIVIL NO. 5:92cv556 (WWE)

CORRECTED
JUDGMENT

This cause came on for consideration on plaintiff's motion for order pursuant to Rule 60(a) or, in the alternative pursuant to Rule 54(b) before the Honorable Warren W. Eginton, Senior United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith granted the motion and further ordered judgment to enter in favor of defendant John L. Read in addition to those defendants in whose favor judgment has already entered, Fed. R. Civ. P. 60(a),

It is therefore ORDERED and ADJUDGED that the judgment be and hereby is entered in favor of the defendants Lep Group, John East, Peter Grant, William Berkley, and John L. Read, in accordance with the court's order.

Dated at Bridgeport, Connecticut this 23rd day of May, 1994.

KEVIN F. ROWE, Clerk

By /s/
Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ITOBA LIMITED

v.

LEP GROUP plc, et al

CIVIL NO. 5:92cv556 (WWE)

JUDGMENT

This cause came on for consideration of the defendants' motions to dismiss before the Honorable Joan G. Margolis, United States Magistrate Judge, having granted the motions to dismiss, and

The Honorable Warren W. Eginton, Senior United States District Judge, after de novo review, and over objection, affirmed Magistrate Judge Margolis' ruling,

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the defendants Lep Group, John East, Peter Grant, and William Berkley, in accordance with the Court's ruling.

Dated at Bridgeport, Connecticut this 16th day of March, 1994.

KEVIN F. ROWE, Clerk

By /s/
Carol E. Cannady
Deputy in Charge

[Memorandum Endorsement]

[Originally typed in margin of first page of U.S. Magistrate Judge Joan Glazer Margolis's Recommended Ruling on Motions to Dismiss]

3/14/94: After de novo review, and over objections, the ruling of the Magistrate Judge is hereby AFFIRMED.

/s/
Warren W. Eginton,
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

ITOBA LIMITED	:	5:92 CV 00556 (WWE)
V.	:	
LEP GROUP plc, ET AL.	:	DATE: FEBRUARY 4, 1994

RECOMMENDED RULING ON MOTIONS TO DISMISS

On September 22, 1992, plaintiff Itoba Limited ["Itoba"] commenced this securities action with respect to allegedly fraudulent non-disclosure of facts in press releases and filings with the Securities and Exchange Commission ["SEC"] made by the defendant LEP Group plc ["LEP"]. As set forth in its complaint, Itoba is a corporation organized under the laws of the States of Jersey, Channel Islands, with its principal place of business in St. Helier, Jersey, Channel Islands (¶8). Itoba is a wholly-owned subsidiary of ADT Limited ["ADT"], a corporation organized under the laws of Bermuda, with its principal place of business in Hamilton, Bermuda (id.). Defendant LEP is a corporation organized under the laws of England, with its registered office in Epsom, Surrey, England (id. ¶10). The four additional defendants are present or former directors of LEP -- William R. Berkley (who resides in Greenwich, Connecticut), John L. Read, Peter J. Grant and John R. East.[1]

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[1]The action has been stayed as against defendant Read, a citizen of England who filed an Individual Voluntary Arrangement under British law. See Ruling on Pending Discovery Motions, filed Apr. 5, 1993 (Dkt. #81), at 3-6.

After jurisdictional discovery was completed, on May 24, 1993, defendants LEP, Berkley, Grant and East filed motions to dismiss plaintiff's complaint on the grounds that this court lacks subject matter jurisdiction or, in the alternative, that the complaint should be dismissed under the doctrine of forum non conveniens (Dkt. ##83-88).[2] On June 28, 1993, plaintiff filed its brief in opposition and four affidavits (Dkt. ##90-94).[3]

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[2]Defendant Berkley also filed an affidavit from his counsel, William G. McGuiness (Dkt. #85), to which the following four exhibits were attached: excerpts from the deposition of defendant Berkley, taken on March 10, 1993 ["Berkley Dep. Tr."] (Exh. 1); excerpts from the deposition of David B. Hammond, taken in London on November 24-25, 1992 ["Hammond Dep. Tr."] (Exh. 2); excerpts from the deposition of David L. Crespel, taken on February 10, 1993 ["Crespel Dep.Tr."] (Exh. 3); and excerpts from the telephone deposition of Peter W.S. Percival, taken on April 23, 1993 ["Percival Dep. Tr."] (Exh. 4).

Attached to the motion of defendants LEP and East was an affidavit from their attorney, Jeffrey E. Glen (Dkt. #87), to which nine exhibits were attached: copy of LEP's Form 6-K, filed with the SEC on July 6, 1989 (Exh. 1); copy of LEP's Form 6-K, dated October 12, 1989 (Exh. 2); copy of LEP's Form 6-K, dated April 20, 1990 (Exh. 3); copy of LEP's Form 20-F, dated June 29, 1990 (Exh. 4); additional excerpts from the Hammond deposition (Exh. 5); additional excerpts from the Crespel deposition (Exh. 6); excerpts from the deposition of defendant East, taken on February 25, 1993 (Exh. 7); excerpts from the deposition of defendant Read, taken on April 8, 1993 in Naples, Florida (Exh. 8); and additional excerpts from the Percival deposition (Exh. 9).

[3]The first affidavit was prepared by Hammond ["Hammond Aff't"] (Dkt. #91), to which three exhibits were attached: copy of ADT's Form 20-F, filed with the SEC on May 21, 1992 (Exh. 1); copy of ADT's Form 10-K, dated March 31, 1993 (Exh. 2); and copy of LEP's Schedule 13D, filed with the SEC on October 18, 1990 (Exh. 3).

The second affidavit was prepared by Itoba's counsel, Mark C. Zauderer (Dkt. #92), to which the following twelve exhibits were

footnote continued on next page

On July 27, 1993, defendants LEP, East, Berkley and Grant filed a reply brief (Dkt. #97).[4] On August 10, 1993, plaintiff

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attached: copy of plaintiff's complaint (Exh. 1); additional excerpts from the Hammond deposition (Exh. 2); additional excerpts from the Crespel deposition (Exh. 3); additional excerpts from the East deposition (Exh. 4); additional excerpts from the Berkley deposition (Exh. 5); additional excerpts from the Read deposition (Exh. 6); additional excerpts from the Percival deposition (Exh. 7); copy of LEP's Annual Report for 1991 (Exh. 8); copy of "Text of Address" given by David N. James, LEP's Chairman, at the "Extraordinary General Meeting and Annual General Meeting" held on August 24, 1992 (Exh. 9); copy of an article appearing in the London Daily Telegraph on November 21, 1992 (Exh. 10); letter from plaintiff's counsel to defense counsel, dated December 29, 1992 (Exh. 11); and Statement of Ruth Markland, a British solicitor (Exh. 12).

The third affidavit was prepared by defendant Grant (Dkt. #93), to which two charts were attached (Exh. 1), indicating LEP's price on NASDAQ and on the London Stock Daily Exchange, from December 1988 to December 1991.

The last affidavit was prepared by Nicholas Wells ["Wells Aff't"] (Dkt. #94), to which the following two exhibits were attached: a copy of the "Project Bavaria" report, dated December 1989 (Exh. 1); and copy of LEP's Form 20-F, dated June 29, 1989 (Exh. 2).

[4]Three exhibits were attached: additional excerpts from the Hammond deposition (Exh. A); additional excerpts from the Crespel deposition (Exh. B); and an affidavit from defense counsel, Jeffrey E. Glen, with an Opinion by Nicholas Underhill, another English barrister (Exh. C).

filed a surreply brief (Dkt. #99).[5] On June 30, 1993, these motions were referred to this Magistrate Judge (Dkt. #95).

For the reasons stated below, defendants' motions are granted.

I.

FACTUAL BACKGROUND[6]

The jurisdictional facts are as follows:

As previously indicated, Itoba, a corporation organized under the laws of the States of Jersey, Channel Islands, is a wholly-owned subsidiary of ADT, a Bermudian corporation. ADT's primary business is providing electronic security services and alarm systems for residential and commercial property, and conducts an extensive security services business in the United States through its wholly-owned subsidiary, ADT Security Systems, a Delaware corporation (Hammond Aff't ¶¶3-4). ADT maintains executive offices in the United States, its stock is traded on the New York Stock Exchange, and approximately fifty percent (50%) of its shares are held in the United States (id. ¶6). Itoba is one of ADT's approximately twenty subsidiaries whose principal business is to hold investments for ADT (id. ¶¶7-9; Crespel Dep. Tr. at 59).

As previously indicated, LEP is a British corporation. "Ordinary Shares" of LEP's stock are traded on the London

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[5]Four additional exhibits were attached: additional excerpts from the East deposition (Exh. 1); additional excerpts from the Percival deposition (Exh. 2); additional excerpts from the Read deposition (Exh. 3); and an opinion letter from Samuel Stamler and Ian Glick, two more British barristers (Exh. 4).

The filings associated with these motions are nearly six inches thick.

[6]See note 8 infra.

Stock Exchange; however, since September 30, 1988, LEP's American Depository Shares ["ADS"] are traded on the National Association of Securities Dealers Automatic Quotation System ["NASDAQ"]; each ADS is evidenced by an American Depository Receipt ["ADR"], which represents five Ordinary Shares (Crespel Dep. Tr. at 100; Percival Dep. Tr. at 29, 61-62; Berkley Dep. Tr. at 54; Dkt. #87, Exh. 4, at 12-13; Dkt. #94, Exh. 2, at 14-16). It is in connection with the ADS's and ADR's that LEP has made its filings with the SEC (see, e.g., Dkt. #87, Exhs. 1-4; Dkt. #91, Exh. 3; Dkt. #94, Exh. 2). At issue in this litigation are LEP's filings, commencing in July 1989, of Form 6-K's and 29-F, which allegedly failed to disclose significant financial problems; various items were attached to such forms, including LEP's 1988 and 1989 Annual Reports, as well as a press release bearing the dateline, "Greenwich, Connecticut."

In spring 1990, ADT "recommended" to Itoba that the subsidiary purchase LEP stock (Hammond Aff't ¶14; Wells Aff't ¶¶12-14; Hammond Dep. Tr. at 59-60, 70-71, 106-07, 215; Crespel Dep. Tr. at 66-68, 85-86).[7] In reaching this "recommendation," ADT had relied upon a report prepared by an investment bank; this bank, in turn, had reviewed LEP's recent U.K. annual reports and circular to shareholders and its Form 20-F filed with the SEC (Wells Aff't ¶¶5-11, 14; Exh. 1). Executives at ADT, however, did not themselves review the SEC filings (Crespel Dep. Tr. at 74), nor did any executives at Itoba (id. at 68). Between June 4, 1990 and November 23, 1990, Itoba acquired 37,267,830 shares of LEP

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[7]ADT contends that it is common practice for a parent corporation to acquire securities through a wholly-owned subsidiary, which practice avoids early identification of the parent and minimizes disturbances in the market which might affect the stock's trading price (Hammond Aff't ¶13). However, ADT also conceded, at depositions, that the transaction would have been subject to U.K. taxation if the decision to purchase the stock had been made in England (Hammond Dep. Tr. at 215-16; Crespel Dep. Tr. at 25-26, 60, 66).

stock as they became available on the London stock market, for an aggregate price of approximately $114 million (Hammond Aff't ¶21). These shares were purchased through Shearson Lehman's London office, which in turn dealt with other stock brokerage firms, including two located in New York City (Hammond Aff't ¶¶9, 17-18; Hammond Dep. Tr. at 162-68, 218-20; Berkley Dep. Tr. at 54-68).

In September 1991, LEP first disclosed that it was facing financial problems; LEP ultimately wrote off $522 million in losses for that year (Hammond Aff't ¶20; Wells Aff't ¶16). As a result, the value of Itoba's shares fell to approximately $2.26 million, resulting in a loss of $111 million (Hammond Aff't ¶21).

II.

DISCUSSION

Defendants filed this motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, challenging this court's subject matter jurisdiction over this cause of action.[8]

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[8]A threshold matter to be resolved is the appropriate standard of review. There is no dispute that once a party challenges the district court's subject matter jurisdiction, the burden of establishing such jurisdiction rests on the party asserting jurisdiction. Wills v. Ferrandino, 830 F. Supp. 116, 122 (D. Conn. 1993); Washton v. U.S., 2:91 CV 121 (AHN), 1993 U.S. Dist. LEXIS 2863, at *6 n.1 (D. Conn. Feb. 12, 1993); Travelers Indemnity Co. v. Household International, Inc., 775 F. Supp. 518, 522 (D. Conn. 1991). Thus, plaintiff here bears the burden of establishing the court's jurisdiction.

There is similarly no dispute that in deciding a Rule 12(b)(1) motion challenging the district court's jurisdiction, the court may look beyond the complaint and rely on extrapleading materials. Hicks v. Brophy, 3:93 CV 1595(JAC), 1993 U.S. Dist. LEXIS 18495, at *5 (D. Conn. Dec. 14, 1993); Wills, supra, F. 830 Supp. at 122;

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A. SUBJECT MATTER JURISDICTION

Both the Securities Act of 1933 and the Securities and Exchange Act of 1934 are silent as to their extraterritorial application, so that the federal courts have had to determine "whether Congress would have wished the precious resources of the United States courts" to be used in resolving disputes between foreign entities in the area of securities fraud. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.), cert. denied sub nom. Bersch v. Arthur Andersen & Co., 423 U.S. 1018 (1975). To determine whether the district courts have subject matter jurisdiction over these foreign transactions, the Second Circuit has fashioned two principal tests: the "effects test" and the "conduct test." Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir.), cert. denied, 112 S. Ct. 638 (1991). Only one of the two tests must be satisfied in order for subject matter

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Ensign-Bickford Co. v. ICI Explosives USA Inc., 817 F. Supp. 1018, 1023 (D. Conn. 1993); Washton, supra, 1993 U.S. Dist. LEXIS 2863, at *6 n.l. The parties disagree as to how a court should respond to conflicting affidavits, depositions, and documents. Under such circumstances, courts have looked to the decisions which have developed the standards for summary judgment under Rule 56 to "assist in resolving the problem encountered if the affidavits submitted on a 12(b)(1) motion should reveal the existence of factual problems." Exchange National Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); cf. Washton, supra, 1993 U.S. Dist. LEXIS, at *6 n.l.

Looking to Rule 56 summary judgment standards, the court will resolve all factual "ambiguities and inferences" in the light most favorable to the party opposing the motion, in this case, plaintiff Itoba. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Delaware & Hudson RY. Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990), cert. denied, 111 S. Ct. 2041 (1991). Thus, for the purposes of considering defendants' motions to dismiss, the facts will be viewed in the light most favorable to plaintiff. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1330 (2d Cir. 1972).

jurisdiction to be conferred on the district court in a securities fraud action. Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041, 1045 (2d Cir. 1983).

1. "CONDUCT TEST"

In Alfadda, supra, the Second Circuit's described the "conduct test" as follows: "a federal court has subject matter jurisdiction if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." 935 F.2d at 478 (citations omitted).

This test has been applied with varying results. For example, in one of the earliest cases, Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1336-37 (2d Cir. 1972), the action was commenced by American citizens against (the now late) Robert Maxwell, a British citizen, with respect to a British company's stock, traded solely on the London Stock Exchange; subject matter jurisdiction was found because "substantial misrepresentations were made in the United States." The same conclusion more recently was reached in Alfadda, supra, 935 F.2d at 478-79, where the plaintiffs were all residents of Saudi Arabia or Bahrain, and the corporate defendants were either Netherlands Antilles or French companies. However, jurisdiction in this country was appropriate in that the allegedly fraudulent activity, i.e., negotiations and communications which diluted plaintiffs' shares, all took place in the United States. See also Psimenos, supra, 722 F.2d at 1045-48 (subject matter jurisdiction found in action brought by Greek citizen regarding purchases made through defendant's Athens and Paris offices, where plaintiff was induced by pamphlets prepared in the U.S. and where transactions were consummated in New York).

The plaintiff-class in Bersch, supra, were thousands of shareholders, who primarily were citizens of Canada, Australia, England, France, Germany, Switzerland and of

several other European, Asian, African, and South American countries, with some Americans. The action involved the stock of a Canadian company, which had its main business office in Switzerland; the underwriters included two large American banking houses -- Drexel Firestone, Inc. and Smith, Barney & Co -- and four foreign underwriting houses. The prospectuses, which were printed abroad in English, French, and German, and which were delivered to purchasers outside the United States, specifically provided that these shares of stock were not being offered in the U.S. In applying the "conduct test," the Second Circuit differentiated between three sets of plaintiffs: (1) American residents, who could commence securities actions here, without regard to whether the alleged acts of material importance occurred in this country; (2) American residents abroad, who were permitted to commence securities actions here "if, but only if, [alleged] acts . . . of material importance in the United States have significantly contributed [to their losses]"; and (3) foreigners, who could commence such actions here only if the "[alleged] acts . . . within the United States directly caused [their financial losses]." 519 F.2d at 993.

There is no doubt that the factual circumstances here present a closer picture than those presented in the above-referenced Second Circuit decisions. However, it would appear that plaintiff cannot prevail under the "conduct test" under the facts of this case. It is beyond dispute that SEC filings and press releases are the type of information on which an investor relies in making his or her investment decisions. Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968), cert. denied sub nom. Coates v. Securities & Exchange Comm'n, 394 U.S. 976 (1969). Even beyond the issue of whether the SEC filings were "merely preparatory to the fraud," plaintiff cannot demonstrate that the alleged acts within the United States "directly caused [its] losses" for two reasons. First, Itoba and ADT did not read the SEC filings or rely upon them; it was an investment bank hired by ADT which had reviewed these documents. And second, the SEC filings were filed in connection with LEP's ADS's and ADR'S, not the Ordinary Shares purchased by

Itoba, for which annual reports and press releases were generated from England.

This conclusion is consistent with two recent district court opinions, Koal Industries Corp. v. Asland, S.A., 808 F. Supp. 1143, 1153-55 (S.D.N.Y. 1992) and Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 107-08 (S.D.N.Y. 1993). In Koal Industries, the plaintiffs, a Panamanian corporation and nationals, acquired from companies organized in Netherlands Antilles an interest in a mining company located in Arkansas. The negotiations, the drafting of the purchase agreement, and its execution all took place in Switzerland; the financing was obtained from outside the United States. The only contact with the United States, other than the location of the mine, was a single telephone call seeking additional funding; the district court characterized that single telephone call as "at best, a preparatory act," so that subject matter jurisdiction was lacking. The underlying facts in Nathan Gordon Trust are even closer to this case. The defendant was a Canadian corporation whose stock was traded on the New York, Toronto, Montreal, and London Stock Exchanges; the alleged misrepresentations were authored entirely in Canada, although they were attached to documentation filed with the SEC here and to some extent circulated in this country. Relying upon Alfadda, supra, the district court limited the class action to transactions made on the New York Stock Exchange only:

> The court rules that the relevant "conduct" in the present case occurred in Canada where the alleged misleading information was authored. The mere filing of reports with the SEC and the dissemination of some materials to shareholders in the United States were merely incidental to the authorship, preparation and dissemination of the allegedly false information, all of which occurred in Canada. Accordingly, the court does not have

> subject matter jurisdiction over the claims arising from transactions on foreign exchanges.

148 F.R.D. at 108.

2. "EFFECTS TEST"

The second test to be applied is the "effects test," which applies "where illegal activity abroad causes a 'substantial effect' within the United States." Alfadda, supra, 935 F.2d at 478 (citation omitted). As the Second Circuit observed in Bersch, supra, this test is not met "simply because in the long run there was an adverse effect on this country's general economic interests or on American security prices," or when the alleged acts "simply have an adverse [e]ffect on the American economy or American investors generally." 519 F.2d at 989 (footnotes omitted).

Subject matter jurisdiction was found under the "effects test" in Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir. 1989). The plaintiff there was a British corporation, with numerous American subsidiaries; half of its $2.4 billion in assets were located in this country. Defendant was a Luxembourg corporation, largely controlled by South African companies and individuals. The Second Circuit found that the "effects test" had been satisfied, because 2.5% of plaintiff's shareholders were American, holding approximately 5.3 million shares with a market value of approximately $120 million.

In contrast, no subject matter jurisdiction was found in Koal Industries, supra, where the plaintiff was not an American investor, the defendants' stock was neither registered nor listed on a national securities exchange, and the only financial damage was the demise of the Arkansas mine.

If the court were to focus solely upon Itoba, the only named plaintiff, it is clear that the "effects test" would not be satisfied. It is equally clear that if ADT were the plaintiff, the

"effects test" would be met, in that ADT's stock is traded on the New York Stock Exchange and approximately fifty percent (50%) of its shares are held in this country.

Itoba argues that ADT's attributes ought to be considered here, under the rationale of Leasco, supra. In that case, the named plaintiff was Leasco Data Processing Equipment Corporation ["Leasco"], an American corporation, which had negotiated to purchase more than five million shares in Maxwell's company, Pergamon Press Limited, a British company; such stock had been purchased with cash provided by its wholly-owned subsidiary, Leasco International N.V. ["Leasco N.V."], a Netherlands Antilles corporation, and Leasco had unconditionally guaranteed Leasco N.V.'s financial obligations. 468 F.2d at 1332-33. Leasco also sent a letter to the British company indicating that Leasco "has an interest" in the shares of stock, and that such shares "are held on behalf of Leasco . . . N.V." Id. at 1338. Among defendants' arguments to defeat subject matter jurisdiction was that the "purchaser" of the stock was not an American company but a Netherlands Antilles corporation. The Second Circuit disagreed:

> It seems quite arguable from all this that Leasco N.V. is holding the shares merely as trustee for Leasco, which has the beneficial interest and is bound to reimburse Leasco N.V. for the latter's expenditures. If that were so, defendants' contention that the true purchaser was a foreigner would be drained of force. But even if Leasco N.V. is the beneficial owner, it would be elevating form over substance to hold that this entails a conclusion that the purchases did not have a sufficient effect in the United States to make § 10(b) apply. Whether Leasco N.V. is merely a financial conduit, as plaintiffs assert, or was planned to conduct an active business, as some of the SEC filings indicate, it was wholly-owned and its debt securities were guaranteed by Leasco and were convertible

> with Leasco common stock. We see no need to enter into the debate whether, as defendants contend and plaintiffs deny, Leasco obtained substantial tax and other advantages through the incorporation of Leasco N.V. and the use of the latter to acquire the Pergamon shares.

Id. at 1338.

The Leasco case is distinguishable for at least three reasons. First, and most obvious, is the simple fact that the named plaintiff in Leasco was Leasco, an American corporation, and not its foreign subsidiary. Second, despite the copious filings made by both sides, no evidence was submitted here that ADT made any unconditional guaranties of Itoba's obligations. And third, the written contract between Leasco and Pergamon expressly provided that "at [Leasco's] election," the offer to purchase could be made "by a wholly-owned subsidiary of Leasco or a wholly-owned subsidiary of such subsidiary," and that Leasco "shall remain responsible for the due performance" of the obligation to acquire the shares. The Second Circuit thus concluded: "In acceding to this provision the defendants themselves recognized that Leasco, the United States company, remained at all times intimately involved in the transaction; the foreign entity was accepted by both sides as the alter ego of the American." Id. at 1338. In the present action, there were no similar negotiations between Itoba/ADT and LEP, so that LEP could be deemed to have viewed Itoba and ADT as being interchangeable.

In light of these distinguishing factors, this court is not willing to disregard corporate formalities and treat Itoba and ADT as functional equivalents.

B. FORUM NON CONVENIENS

Given the conclusion reached in Section II.A. supra, there is no need to address the issue of forum non conveniens.

III.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss (Dkt. ##83, 86, & 87) are granted.

See 28 U.S.C. § 636(b) **(written objections to ruling must be filed within ten days after service of same);** F. R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d 15, 16 (2d Cir. 1989) **(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).**

Dated at New Haven, Connecticut, this 4th day of February, 1994.

/s/
Joan Glazer Margolis
U.S. Magistrate Judge

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, provides:

> The district courts of the United States, and the United States courts of any Territory or other place, subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is any inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
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> * * *

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 CFR 240.10b-5, adopted pursuant to Section 10(b) of the Securities Exchange Act, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 3 of the Securities Act of 1934, 15 U.S.C. § 78c(a)(17) provides:

> (a) When used in this chapter, unless the context otherwise requires--
>
> * * *

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) other interstate instrumentality.